STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 1999
v	No. 204936 Oakland Circuit Court
JAMES C. WILLIS, Defendant-Appellant.	LC No. 96-146641 FH

Before: Saad, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of delivery of 50 to 224 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), for which defendant was sentenced to ten to twenty years' imprisonment for his conviction. Defendant was originally charged with delivery of 225 to 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). We affirm.

I

Defendant argues that the trial court abused its discretion when it denied defendant's motion to dismiss the charge based on the prosecution's losing a tape recording of the drug transaction. We disagree. We review a trial court's decision regarding dismissal of the charges as an appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

The Due Process clause of the United States Constitution[1] requires that criminal prosecutions comport with notions of fundamental fairness. *California v Trombetta*, 467 US 479, 485; 104 S Ct 2528, 2532; 81 L Ed 2d 413 (1984). This means that a criminal defendant must have a meaningful opportunity to present a complete defense. *Id.* "To safeguard that right, the Court has developed what might loosely be called the area of constitutionally guaranteed access to evidence." *Id.* In *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194, 1196-1197; 10 L Ed 2d 215 (1963), the United States Supreme Court held that:

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The *Brady* rule requires the prosecutor to disclose evidence that is favorable to the accused, evidence, that if suppressed, would deprive the defendant of a fair trial. *United States v Bagley*, 473 US 667, 675; 105 S Ct 3375, 3380; 87 L Ed 2d 481 (1985). The United States Supreme Court, in *Moore v Illinois*, 408 US 786, 794-795; 92 S Ct 2562, 2568; 33 L Ed 2d 706 (1972), further elaborated on the holding in *Brady, supra*:

> Important, then are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.

If the suppressed evidence may have affected the outcome of the trial, then it is material. *Bagley, supra*, 473 US 674-675. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*, 685 (opinion Blackmun, J.) (White concurring).

On appeal, defendant fails to offer a concrete explanation of how the missing cassette tape would have been favorable and material to his defense. *United States v Valenzuela-Bernal*, 458 US 858, 872; 102 S Ct 3440, 3449; 73 L Ed 2d 1193 (1982). On appeal, defendant simply argues that "the missing tape would have been material to the case inasmuch as it might have affected the credibility of key prosecution witnesses, namely Winters and Harris, and would have been a useful tool in confronting those witnesses in cross-examination."

In *Trombetta, supra*, the United States Supreme Court expressed concern that when evidence is lost, that maybe "potentially exculpatory evidence" the importance of the materials are unknown to the defendant and oftentimes disputed. *Trombetta, supra*, 467 US 486. However, here, defendant's attorney heard the contents of the cassette tape at the preliminary examination before the cassette tape was lost. Moreover, defendant requested an evidentiary hearing to determine whether the tape recorded conversation was material to defendant's case. The trial court granted defendant's request and held an evidentiary hearing. Defendant was present during the drug transaction and therefore knows what he and the others actually said during the transaction. Accordingly, defendant cannot establish a violation without "making some plausible explanation of the assistance he would have received from" the introduction into evidence of the cassette tape. *Valenzuela-Bernal, supra*, 458 US 871.

Therefore, the trial court properly denied defendant's motion to dismiss the charges. Defendant has made no showing or advanced any explanation that the evidence had a reasonable probability of affecting the outcome of the case had defendant been given the cassette tape. *Bagley, supra*, 473 US 682, 685 (opinion Blackmun, J.) (White concurring).

II

Defendant also contends that the trial court erroneously denied defendant's request for an instruction regarding the missing tape recording. We disagree. The determination if a jury instruction is accurate and applicable lies within the sound discretion of the trial court. *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996). This Court reads jury instructions in their entirety to determine if error requiring reversal of the conviction occurred. *Id.* There is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

In *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993), the defendant argued that the trial court should have instructed the jury that it could infer that missing evidence would have been favorable to the defendant if the prosecution failed to make reasonable efforts to preserve material evidence. *Id.*, 515. The *Davis* Court held that because the defendant did not demonstrate that the prosecution acted in bad faith in failing to produce the evidence, and because the evidence either did not exist or could not be located, failure to give the instruction was not in error. *Id.*, 515. It appears that the defendant in *Davis* did not contend that the missing evidence would have been exculpatory, or that the prosecution violated the *Brady* rule.

Defendant further argues that *Davis, supra,* is inapplicable because the defendant, in that case, was required to establish bad faith on the part of the prosecution whereas in the instant case, defendant was not required to make such a showing under the *Brady* rule. *Brady, supra*, 373 US 87. Nonetheless, *Davis* is analogous.

In *Davis, supra,* this Court ruled that the trial court did not err in giving a missing evidence instruction because the defendant failed to establish bad faith on the part of the prosecution which the defendant was required to do. *Davis, supra,* 199 Mich App 515. Here, we conclude that the trial court did not err in denying to give a missing evidence instruction because defendant failed to make a showing that the evidence was material in that it would have affected the outcome of the trial as he was required to do. *Valenzuela-Bernal, supra*, 458 US 871. Accordingly, the trial court did not err in denying defendant's request for the missing evidence instruction.

III

Additionally, defendant says that the trial court should have granted his motion for a directed verdict because there was insufficient evidence to support the charge against him. We disagree. When reviewing a trial court's denial of a motion for directed verdict, we view the evidence presented up to the time the motion was made, in the light most favorable to the prosecution, to determine if the evidence was sufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998).

The offense of delivery of 225 to 650 grams of cocaine requires the prosecutor to prove four elements: (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing between 225 and 650 grams, (3) that the defendant was not authorized to possess the substance, (4) that the defendant delivered the cocaine. *People v Marji*, 180 Mich App 525, 530-531; 447 NW2d 835 (1989); *People v Lewis*, 178 Mich App 464, 468; 444 NW2d 194 (1989). Delivery is defined as "the actual, constructive, or attempted transfer from one person to another of a controlled

substance." MCL 333.7105(1); MSA 14.15(7105)(1); *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996). Defendant disputes only that he aided and abetted in the actual delivery.

To support a finding that defendant aided and abetted in the commission of a crime, the prosecution must establish three elements: (1) the crime charged was either committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement which aided and assisted the commission of the crime; and, (3) it must be shown that the defendant intended the commission of the crime, or had knowledge that the principal intended its commission at the time of giving aid and encouragement. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995); *People v Acosta*, 153 Mich App 504, 512; 396 NW2d 463 (1986). An aider and abettor's state of mind may be inferred from all the facts and circumstances. *Turner, supra*, 213 Mich App 568.

The evidence established that defendant was present during the drug transaction. He supplied the scale used to weigh the cocaine that Lieutenant Winters and Harris were buying from Jamison. He moved the cocaine closer to Lieutenant Winters in order for Lieutenant Winters to weigh it. He helped Jamison count the money which Lieutenant Winters and Harris were handing over. Finally, when the surveillance team came in to secure the apartment, defendant was found near the kitchen where the money was still laying on the table with the scale in his pocket. When viewed in a light most favorable to the prosecution, these facts are sufficient for a reasonable trier of fact to find beyond a reasonable doubt that defendant or Jamison committed the delivery of cocaine, that defendant performed acts which aided and assisted in the delivery of cocaine, and that defendant intended the delivery of cocaine or had knowledge that Jamison intended to deliver cocaine at the time of giving such aid and encouragement. *Turner, supra*, 213 Mich App 558; *Marji, supra*, 180 Mich App 530-531; *Lewis, supra*, 178 Mich App 468; *Acosta, supra*, 153 Mich App 512.

IV

Defendant also maintains that his conviction must be reversed because he was prejudiced by several instances of prosecutorial misconduct. Again, we disagree. Defendant properly preserved only three of his allegations of prosecutorial misconduct by objecting to the prosecution's remarks on the same grounds that he now asserts on appeal or by seeking a curative instruction at trial. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). If defense counsel fails to object, review is foreclosed unless the prejudicial effect of the remark was so great that it could have been cured by an appropriate instruction or a failure to review the issue would result in a miscarriage of justice. *Stanaway, supra*, 446 Mich 687; *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993). If the defendant does preserve his claims of prosecutorial misconduct, those claims are decided case by case. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). This Court will examine the record and evaluate the alleged improper remarks in context. *Id.* The test is whether the defendant was denied a fair and impartial trial. *Id.*

Defendant further argues that he was denied a fair trial when the prosecution improperly questioned a witness regarding a previous drug purchase involving defendant. The prosecution wanted to ask Harris if he had ever met defendant prior to the drug transaction which took place on February

23, 1996. Defense counsel objected, arguing that a prior meeting was irrelevant. In front of the jury, the prosecution responded:

> It's of course relevant. His entire defense is mere presence. If this individual has met James Willis in the context of purchasing drugs, it's entirely relevant as to whether or not he participated in the drug sale. That's my offer of proof.

Defense counsel responded that there was never a prior meeting and that Harris never testified to a prior meeting at the preliminary examination. The trial court indicated that he did not think that the prosecution had said that Harris had testified to a prior meeting. The jury was then dismissed for argument. After argument, the trial court refused to allow the prosecution to continue with this line of questioning and asked defense counsel if he wanted a cautionary instruction. Defense counsel declined the opportunity to draft a cautionary instruction. Before the jury was called back into the courtroom, the trial court again asked defense counsel if he wanted a cautionary instruction. Defense counsel agreed that it was enough for the trial court to instruct the jury that the prosecution's last question was improper. The trial court stated to the jury, "The Court has ruled the last question was improper. Mr. Martin [the prosecutor] will continue with some other questions." Accordingly, the trial court adequately addressed defendant's claim of error. The prosecution was not allowed to continue this line of questioning and the trial court issued a cautionary instruction that the prosecution's question was improper. The trial court gave defense counsel the opportunity to fashion his own cautionary instruction and he refused. Any error was cured by the cautionary instruction. *People v Lee*, 212 Mich App 228, 246; 537 NW2d 233 (1995); *People v Curry*, 175 Mich App 33, 44-45; 437 NW2d 310 (1989).

Defendant next argues that the prosecution denigrated defense counsel. We disagree. A prosecutor's closing argument is proper if it is based upon the evidence and the jury is not called upon to decide a case on the basis of the prestige of the prosecutor's office. *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988). A prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The statements which defendant finds objectionable did not deny defendant a fair and impartial trial. *Paquette*, *supra*, 214 Mich App 342. The prosecution's remarks did not personally attack defense counsel or shift the jury's focus from the evidence to defense counsel's personality. *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996). The prosecution simply answered defendant's arguments that the police were lying. Moreover, the prosecution's statement was directed toward Jamison, not defendant.

Defendant also argues that the prosecution denied him a fair trial by making the following statement:

> Nonetheless, imagine, for a moment, that everything was the same, but that for some reason, one of your loved ones was present; and that Defendant Jamison was responsible for hurting your loved one. Sure there's testimony as to that, but I'm asking you to use your imagination. Now, he has hurt one of your loved ones. By any means which --

Jamison's defense counsel objected. The prosecution informed the jury that his argument was in response to Mr. Mitchell, Jamison's attorney's argument. Defendant did not object to the argument, but asked that the prosecution's argument be limited to Jamison, which it was. Accordingly, any error was addressed and cured at trial. *Lee, supra*, 212 Mich App 246; *Curry, supra*, 175 Mich App 44.

Finally, defendant argues that the prosecution impermissibly called on defendant to present evidence of his innocence. Defendant objects to the following:

> Now, I have one question for Mr. Mitchell; he put a question to me about my Opening. I have one question to Mr. Mitchell. What did he ever present to you--

Jamison's attorney and the trial court listened to arguments outside of the jury. When the jury came back, the trial court instructed:

> *The Court:* Members of the jury, Mr. Martin mistakenly spoke about the Defendant, or Defendants, did not prove, or something. This clearly was an error. He misspoke himself and mis-stated the law. You do understand that the Defendants do not have to prove anything. It's the Prosecutor's burden of proof beyond a reasonable doubt each and every element of the crime. Do you understand that?
>
> *Jurors:* Yes.
>
> *The Court:* Further, that every Defendant has an absolute right not to testify. In deciding the case, you must not consider the fact that he did not testify, and it must not affect your verdict in any way. Do you understand that?
>
> *Jurors:* (Inaudible).
>
> *The Court:* Also, attorneys are human beings, just like you and I. And sometimes they talk about things that they think may be evidence, or there had been testimony about. Just like I told you that if I make a finding on the record, and remember some testimony, if you don't remember it, you're not bound by it. Do you remember me saying that to you several times? That's also true about the attorney's arguments, that the lawyers statements and arguments are not evidence. They are only meant to help you understand the evidence and each sides' legal theories. The lawyer's questions to witnesses are also not evidence, and you should consider these questions only as they give meaning to the witnesses answers. You should only accept things the lawyers say that are supported by the evidence, or by your own common sense and general knowledge. And what I mean by the evidence, I mean by the testimony from the witness stand, or the exhibits admitted into evidence.

This instruction accurately states the law and was sufficient to correct any error incurred by the prosecution's argument. *Lee, supra*, 212 Mich App 246. Accordingly, defendant was not denied a fair trial by the prosecutor's questions and arguments.

Finally, defendant argues that the cumulative effect of the trial errors denied him a fair trial. We disagree. Only actual errors are aggregated to determine their cumulative effect, and because we did not find any errors, reversal is not required. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Peter D. O'Connell

[1] US Const, Am VI, XIV.